

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EVA TWITCHELL

Claimant

VS.

ACME FOUNDRY

Self-Insured Respondent

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Docket Nos. 1,013,328 &
1,024,037

ORDER

Claimant requested review of the February 22, 2007 Award by Special Administrative Law Judge (SALJ) Marvin Appling.¹ The Board heard oral argument on July 10, 2007.

APPEARANCES

Kala Spigarelli, of Pittsburg, Kansas, appeared for the claimant. Paul M. Kritz, of Coffeyville, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that the \$450 in unauthorized medical allowance is no longer at issue and will be paid by respondent as directed in the Award.

ISSUES

The SALJ awarded the claimant a 21 percent permanent partial impairment to her left leg and a 17 percent permanent partial impairment to her left arm.² He based her compensation rate upon an average weekly wage of \$550.88 for her first accident³ and

¹ The Award was not served upon the parties until April 10, 2007 and as a result, the claimant's Application for Review appears to have been filed out of time based upon the date of the Award. Nonetheless, the parties have agreed that neither has any objection to the Board's jurisdiction to hear this matter.

² The SALJ purported to average the opinions from each of the doctors to each respective body member. But for whatever reason, it is clear that the impairment ratings issued in the Award bear no logical relationship to the opinions expressed by the physicians.

³ This is Docket No. 1,013,328.

\$419.60 for her second⁴ and awarded an additional 1.28 weeks of temporary total disability (TTD) benefits for the second (knee) claim.

The claimant has appealed the Award and makes a number of arguments. First, she contends the ALJ erred in averaging the impairment ratings offered by the physicians. In addition, she maintains the SALJ "did not consider work disability in his Award and did not give an explanation for failing to do so. Therefore, it was error for him not to."⁵ Claimant then goes on to argue that since she is no longer working, a factual development that occurred at some undefined point after the Regular Hearing, she is permanently and totally disabled. Thus, the Board should modify the Award to reflect this new status. And claimant maintains the average weekly wage on the first accident should be between \$555.70 and \$600 rather than the lower figure found by the ALJ and advocated by respondent.

Respondent contends the Award should be modified as well, albeit for different reasons. Respondent urges the Board to find the ratings of Drs. Melhorn and Mosier to be the more appropriate permanent impairment ratings thereby lowering the claimant's separate functional impairments. Moreover, respondent maintains the Award must be modified to reflect an appropriate credit for the TTD already paid as a result of claimant's two separate claims.

The issues to be decided in this appeal are the nature and extent of claimant's impairment as a result of her two separate work-related accidents, her average weekly wage for each of those accidents and whether claimant is entitled to 1.29 weeks of TTD in Docket No. 1,024,037.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant sustained two separate accidents. Her first docketed claim involves her upper extremities and by the parties' agreement, occurred over a period of time, culminating on July 21, 2003. Claimant was provided with treatment and diagnosed with bilateral carpal tunnel. Surgery was performed to her right hand and her relief has been less than optimum. She continued to complain of pain and numbness in her hands and some pain in her shoulders.

⁴ This is Docket No. 1,024,037.

⁵ Claimant's Brief at 5 (filed May 15, 2007).

Claimant continued to see the doctor and was eventually referred to Dr. Kenneth Johnson, who performed an MRI to the right shoulder and provided her with an injection. Dr. Johnson later referred claimant to Dr. Kevin Mosier who saw her in late June 2004. He diagnosed right shoulder rotator cuff tendonitis, provided her with an injection and released her from his care.

Claimant was eventually referred to Dr. J. Mark Melhorn for treatment to her upper extremities. According to Dr. Melhorn, claimant suffers from painful right and left upper extremities, not bilateral carpal tunnel.⁶ He explained that while her subjective symptoms indicate bilateral carpal tunnel, she was not presently “diagnostic” of that condition based upon the nerve conduction study. And he refused to request or perform an EMG. Moreover, he testified that he does not believe claimant’s upper extremity condition is caused by repetitive work. While work does *contribute* to her symptoms, it did not cause her present subjective complaints.

During the course of his treatment Dr. Melhorn treated claimant’s right shoulder and her neck with injections but in the end, he only provided permanency ratings to claimant’s upper extremities. He assigned a 3.25 percent to each upper extremity.

In December 2004, claimant fell at work and alleges she injured both her knees. Claimant returned to see Dr. Mosier in February 2005 this time with left knee complaints attributable to the fall she sustained in December 2004. According to Dr. Mosier, the only complaint claimant made during that visit was to her left knee. He examined her and had an MRI performed, which revealed arthritis and a chronic medial meniscus tear. Dr. Mosier recommended surgery when injections did not prove helpful and that procedure was ultimately performed.

Following surgery, Dr. Mosier followed up with physical therapy, injections and then more therapy to the left knee. In February 2005, approximately 5 months after her first visit, claimant voiced a complaint about her right knee. Apparently another physician had performed an MRI to the right knee in response to her complaint and like the left, there was patellar chondromalacia, an arthritic condition found in the knee cap.

According to Dr. Mosier, claimant bears a 16 percent permanent partial impairment to the left lower extremity, 8 percent of which was preexisting. The remaining 8 percent reflects an aggravation of her underlying arthritic condition and is attributable to the December 2004 accident. Dr. Mosier declined to assign any permanency to the right knee as he believed it was not caused by the December 2004 work-related accident.

At her lawyer’s request claimant was evaluated by Dr. Edward Prosic in November 2004 and again in January 2006. The first evaluation generated a diagnosis of bilateral cubital tunnel, bilateral thoracic outlet syndrome and bilateral rotator cuff irritability and right

⁶ Melhorn Depo. at 33.

hand, post-surgery carpal tunnel. He examined her again in 2006 and assigned a 30 percent permanent partial impairment to the left upper extremity and a 25 percent permanent partial impairment to the right.

At this second examination, Dr. Prostic also evaluated claimant's knees, summarily concluding that her fall caused bilateral knee impairments. He assigned a 35 percent permanent partial impairment to the left leg and 20 percent to the right leg. Although he concedes claimant had preexisting arthritic disease in her knees, he is unable to say how much, if any, preexisted the fall in December 2004. As a result, he attributes all of the assessed impairment to the accident.

After considering this evidence, the SALJ purported to average the opinions offered by each of the doctors for the body members they treated and rated and ultimately awarded a 21 percent permanent partial impairment to the left knee and a 17 percent permanent partial impairment to the left arm. After considering these findings, the record as a whole, and the parties' arguments, the Board finds that the Award must be modified.

The record reveals substantially consistent diagnostic opinions with respect to claimant's upper extremities. Setting aside Dr. Melhorn's semantic argument, claimant was diagnosed with bilateral upper extremity complaints that, at least to the right hand, required surgery. Dr. Prostic assigned a 30 percent permanent partial impairment to the left upper extremity and a 25 percent permanent partial impairment to the right. Dr. Melhorn's assessment was much less, at 3.25 percent permanent partial impairment to each upper extremity. The Board finds that each physicians' opinion should be given equal weight and the result is 16.63 percent permanent partial impairment to the left upper extremity and 14.13 percent permanent partial impairment to the right upper extremity.

Dr. Prostic also rated claimant's lower extremities, assigning a 35 percent permanent partial impairment to the left leg and a 20 percent to the right. And while Dr. Mosier assigned a 16 percent to claimant's left lower extremity, he refused to assign any impairment to claimant's right lower extremity attributable to the accident given the delay in the onset of her right knee complaints. After considering the record as a whole, the Board finds that claimant has sustained her burden of proof as to the left knee only. Like Dr. Mosier, the Board is not persuaded that claimant's right knee complaints bear any relationship to the December 2004 accident. Five months passed from her first visit and her first complaint relating to the right knee. And there is simply no explanation for this gap. Accordingly, the Award will be modified to reflect an average of the two ratings for the left knee, leaving claimant with a 25.5 percent permanent partial impairment to the left lower extremity at the level of the knee. No permanency is found on the right knee.

Additionally, no credit was made for the alleged pre-existing impairment in claimant's knees as there was an insufficiency of evidence on that issue.⁷ Instead Dr. Mosier merely

⁷ See K.S.A. 44-501(c).

speculated that a percentage of claimant's current disability was due to claimant's preexisting condition which was never identified based on the *AMA Guides*. Accordingly, the Board finds the record failed to prove whether claimant had any preexisting functional impairment.

The more problematic issue to consider is claimant's argument that her scheduled injuries entitle her to a permanent partial general (work) disability under K.S.A. 44-510e(a) as well as the argument that she is now permanently and totally disabled under K.S.A. 44-510c. Claimant alleged, in her brief to the Board and at oral argument, that since this case was submitted, she was "fired" and no longer able to work. Thus, the Board should award her permanent total disability. The difficulty with claimant's belated argument is that there is no evidence *within the record* to substantiate this claim. In fact, the only evidence within the file is that claimant had returned to work following both of her accidents, performing her normal work duties without accommodation. If, in fact, the claimant has ceased working, then claimant should consider filing a request for Review and Modification under K.S.A. 44-528. But it is simply inappropriate to attempt to interject that issue following a Regular Hearing while the claim is on appeal.

The Board also finds that claimant is not entitled to a work disability, as she claims. The Kansas Supreme Court in *Casco*⁸ recently addressed the method of computing an injured employee's recovery in parallel injury claims. While bilateral upper extremity claims were routinely computed as a whole body injury (and work disability under K.S.A. 44-510e(a) was then a possibility), the *Casco* Court has dictated that scheduled injuries are now the rule.⁹ And unless the claimant can establish permanent total disability status as a result of the parallel injury, then any recovery is limited to separate scheduled impairments. Accordingly, although the parties in this case tried this matter as if claimant's bilateral upper extremity claim would constitute a whole body impairment, *Casco* has effectively foreclosed that argument. At the time of the Regular Hearing claimant continued to work at her normal work duties and she is therefore, not permanently and totally disabled. Therefore, her recovery is limited to 2 upper extremity permanent partial impairments in Docket No. 1,013,328 and a left knee permanent partial impairment in Docket No. 1,024,037.

Turning now to the average weekly wage issue, claimant advocates a finding of \$555.70 to \$600 per week and seems to make no distinction between the two dates of accident. Claimant testified that her gross pay (at the time of her first accident) was approximately \$600 per week based upon a base hourly wage of \$10.25 per hour.¹⁰ Conversely, respondent's submission letter offered a wage of \$550.88 based upon the

⁸ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

⁹ *Id.*, Syllabus paragraph 7.

¹⁰ R.H. Trans. at 28-29.

TTD rate paid by the insurer, although there is no explanation for how that figure was computed.

The SALJ adopted the respondent's figures and the Board finds this must be modified. Claimant testified that she was earning \$10.25 per hour and her base rate was therefore \$410 per week. Claimant also testified she earned overtime pay and worked a total of 48-50 hours per week. Averaging her overtime hours at 9 hours per week, this increases her weekly wages by \$138.42. The total is \$548.42 and the Board modifies the Award to reflect this figure as the average weekly wage in Docket No. 1,013,328.

Claimant further testified that after her first accident, she was restricted from working overtime and her hourly wage increased to \$10.49 per hour, leaving her with gross wages of \$419.60 per week. Respondent concurs with this conclusion and claimant has offered no alternative evidence relating to this date of accident. Accordingly, the SALJ's finding with respect to wage in Docket No. 1,024,037 is affirmed.

Finally, the SALJ awarded claimant an additional 1.29 weeks in TTD based upon her testimony that she was not paid for a week and 2 days immediately following her December 2004 knee injury. The Board finds that this aspect of the Award should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated February 22, 2007, is modified as follows:

DOCKET NO. 1,013,328

The claimant is entitled to 33.26 weeks of permanent partial disability compensation, at the rate of \$365.63 per week, in the amount of \$12,160.85 for a 16.63 percent loss of use of the left forearm, making a total award of \$12,160.85.

The claimant is entitled to 24.51¹¹ weeks of temporary total disability compensation at the rate of \$365.63 per week in the amount of \$8,961.59 followed by 24.80 weeks of permanent partial disability compensation, at the rate of \$365.63 per week, in the amount

¹¹ This is the amount previously paid by the respondent for temporary total disability and temporary partial disability combined. Since the amount of weeks for temporary total disability were not separated out the Board took the total amount paid and divided that by the rate paid to obtain the number of weeks for temporary total disability.

of \$9,067.62 for a 14.13 percent loss of use of the right forearm, making a total award of \$18,029.21.¹²

DOCKET NO. 1,024,037

The claimant is entitled to 13.86 weeks of temporary total disability compensation at the rate of \$283.23 per week in the amount of \$3925.62¹³ followed by an additional 1.29 weeks of temporary total disability compensation at the rate of \$283.23 per week in the amount of \$365.37 followed by 51.00 weeks of permanent partial disability compensation, at the rate of \$279.75 per week, in the amount of \$14,267.25 for a 25.50 percent loss of use of the leg, making a total award of \$18,558.24, less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Paul M. Kritz, Attorney for Self-Insured Respondent
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge

¹² Because claimant received TTD after surgery on the right hand the TTD was credited against the right arm award.

¹³ This is the amount was previously paid by the respondent for temporary total disability.